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# DISPUTE RESOLUTION PRACTICES IN THE CONSTRUCTION INDUSTRY IN PALESTINE

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## ABSTRACT

The construction industry is subject to more conflicts, disputes and claims more than many other industries. Construction industry in Gaza Strip suffers from the misunderstanding of dispute resolution management as a number of factors affect the development of dispute resolution practice. Over the last years, there has been a break down in the relationship between parties involved in the construction process which affected the development and expansion of the construction sector. The current unstable political condition has also contributed to the increase in the number of construction disputes. The objective of this paper is to examine the current dispute resolution practices in the construction industry in the Gaza Strip. The results of this study indicated that litigation method is rarely used in resolving disputes as it depletes more time and cost, and can cause side conflicts between owners and contractors. In the Palestinian environment, choosing court to resolve disputes is considered by many as an aggressive act, unlike western culture. Alternative dispute resolution methods are mostly used in Gaza Strip. The results also showed that most contractors used informal negotiation in resolving disputes with owners. It is advisable to organize regular training programs in order to increase contracting parties' knowledge concerning dispute resolution systems and how to deal with conflicts in the most efficient and practical way.

**Keywords:** Dispute, resolution, litigation, negotiation, construction

## INTRODUCTION

Most governmental and non-governmental institutions in the Gaza Strip are using different types of contracts in their projects. The selection of the contract depends on several factors such as: agency type, project type, and donor identity. Sometimes the local agencies are enforced to use the donor country contract for projects financed by that Donor. Also the agency may use more than one type of contracts according to the project type. Most of the agencies presume the special conditions in order to overcome some of the general conditions provisions that are not suitable to the agency.

The most used form of international contract is FIDIC. FIDIC is the French acronym for the International Federation of Consulting Engineers, which was founded in 1913. Other construction contracts used in the Gaza Strip are: European Community (EC), World Bank (WB), unified contract for public works. Owner often uses his own contract forms in projects unless Donors select another contracting system. All construction contracts include provisions for dispute resolution procedures. These provisions can be different from one contract to another according to the nationality and regulation of donor agency. According to the concept of the conflict spectrum any conflict begins with a claim, which if it is unresolved can lead to a dispute, and it required a fair resolution by one of the reciprocal dispute resolution techniques.

The local institutions that involved in the construction dispute resolution are: local courts, Association of Engineers (AoE), Palestinian Contractors Union (PCU) and some private experts. Association of Engineers is considered one of the most reliable agencies that can assist in resolving many construction disputes. Most of owners, especially the public owners, stated in their contract provisions that in case of dispute occurs it should be referred to AoE to resolve it. The objective of this paper is to examine the current dispute resolution practices in the construction industry in Gaza Strip.

## **CONSTRUCTION DISPUTE RESOLUTION**

Roxene (1998) stated that changes in construction technology and the complexity of projects have made building more complicated. Present used contracts and project management techniques are struggling to keep up with the dynamics of industry. In addition, owners have become highly leveraged with tighter budgets and restricted cash flow. Pressures to get projects up and running have led to tighter time schedules and experiments with new accelerated project delivery methods. As a result, the cumulative effect of these factors has caused traditionally cooperative relationships to deteriorate, and be replacing by adversarial, antagonistic relationships, 'win-lose' attitudes, and general dissension. Cheung and Chuah (1999) reported that in recent years, a number of researchers and practitioners in project management have reported that there is an increasing trend in the use of cross-functional project teams because of the dynamic nature of today's projects and their life cycles.

Yates (2003) stated that contractors' claims are often opportunistically inflated, exaggerated or even spurious and clients (and their staff/consultants) frequently respond with reciprocal opportunism, by rejecting contractors' claims out of hand. Theoretically, it is possible that a claim genuinely made by one party could genuinely be disputed by the other involving no opportunistic behavior by either party. In today's complex construction projects, resolving disputes has become an inevitable part of a project manager's work (Cheung, 1999). The methods of resolving disputes range from informal negotiation to formal proceedings like arbitration and litigation. Arbitration and litigation proceedings have proved to be time consuming and expensive. In addition, these proceedings are often confrontational and require many hours of unproductive effort (Cheung and Yeung, 1998, Barrie and Paulson 1992).

While litigation is generally the most costly means of resolving construction disputes, it certainly presents the best opportunity for a party to have its dispute determined in accordance with applicable laws and in a formal setting where the rules of evidence apply. Resolution of a dispute through the courts also affords a party the chance for a jury trial and, when appropriate, the ability to appeal an adverse ruling (UNITAR, 2004). Cheung (1999) stated that litigation is a rigidly regulated process, the process is subject to the rules and procedures set out by the court. By adopting the litigation route, the parties surrender their control over the process and a third party will impose the outcome. The courts are seen as too expensive and too slow to resolve cases.

Alternative Dispute Resolutions (ADR) is the generally accepted acronym for alternative dispute resolution. Most simply put, ADR denotes all forms of dispute resolution other than litigation or adjudication through the courts. ADR provides an opportunity to resolve disputes and conflict through the utilization of a process that is best suited to the particular dispute or conflict (Barkai 2003). Taschuk and Chambers (1999) said that ADR could be defined as a collection of techniques for the resolution of disputes quickly and economically, in a fashion not usually possible with the traditional litigation process. It is important to note that these processes are not designed to remove the court process, nor are they mutually exclusive.

Within the past decade, the construction industry in the US has taken steps to avoid litigation and to control disputes by developing and employing various mechanisms for alternative dispute resolution that can be implemented during almost any stage of a construction project (Jannadia et al. 1999). In opposite to litigation, which is characterized by open proceedings, Agarwal (2001) said that alternative dispute resolution proceedings take place in private. They are not public proceedings. Thus, they ensure confidentiality. Kaplan et al. 1991; Fenn and Gameson 1992; Brown and Marriott 1999 as cited in Cheung et al. (2002) concluded that the perceived shortcomings of litigation and arbitration, with their concomitant rise in costs, delays, and adversarial relationships, have encouraged the rapid growth of alternative dispute resolution processes, namely conciliation, mediation, adjudication, and other hybrid processes.

Prevention techniques do not guarantee total dispute elimination. In negotiation, the parties have absolute freedom with respect to the form, process and type of agreement. If negotiation fails, the disputants can assign a neutral third party, which has two possible formats, the standing neutral and non-binding resolution. Dispute review boards and dispute resolution advisors have been used for the purpose of the standing neutral. The standing neutral concept involves the participation of a neutral person in order to solve problems at the source (Cheung, 1999, Barkai, 2003). Zanelidin (2006) stated that claims in the United Arab Emirates appear to hinder the completion of the construction and cause delays in delivering projects. Hassanein and El Nemr (2008), for example, reported that claims management in the Egyptian construction sector suffers from the lack of proper notification procedures and poor documentation management.

Under the title of (ADR is the fast-track method) Totterdill (2000) said that many of the differences, claims and disputes will be resolved by discussion and negotiation between the people who are working on the site. However, problems may arise which cannot be resolved by direct negotiation. Some forms of outside assistance will be required. The challenge for the engineers and managers, on both sides of the dispute, is to agree on a procedure, which will resolve the problem with the minimum disturbance to the project and the minimum cost to the parties to the contract. Cheung and Yeung (1998) reported that the traditional methods used in dispute resolution were litigation and arbitration.

Barkai (2003) ensured that it is possible to combine both mediation and arbitration. Some processes provide of "Med-Arb" or even "Arb-Med". "Med-Arb" means to use mediation first and then to use arbitration if the mediation does not produce a solution. "Arb-Med" means to use arbitration first to reach a decision and then allow the parties to mediate the same dispute to see if they can negotiate in mediation an agreement that is better for both parties than the arbitration award. These processes might use the same person as both the mediator and the arbitrator.

## **METHODOLOGY**

The research approach adopted in this study comprised a preliminary pilot study and questionnaire survey. The pilot study was conducted following a review of literature with eleven local experts who were able to provide competent information. The pilot study was conducted to test the validity and the reliability of the research tool, and to ensure that the information sought in the questionnaire would be relevant to the study. The questionnaire was refined a number of

times based on the feed back from experts panel before it was used as a base for the structure questionnaire that have been used for data collection. There are numerous methods available in the international commercial world for resolving construction disputes between contract parties. Resolution methods classification depends on the formality of the method, so that formal and informal are the main categories of these methods. Many construction dispute resolution methods were collected from the literature such as; Cheung 1999, Cheung and Yeung 1998, Thomas 2000, UNITAR 2004, Barkai 2003, Cheung 1999).

Extensive use was made of ordinal scale measures for eliciting data on respondents' perceptions. Ordinal scale is a ranking or rating data that normally uses integers in ascending or descending order. The respondents were asked to rate their agreement or disagreement concerning the stated dispute causes on a five-point Likert scale, where 1= strongly agree, 2 = agree, 3 = no idea, 4 = disagree, and 5 = strongly disagree. The numbers assigned to the agreement or degree of influence (1, 2, 3, 4, and 5) doesn't indicate that the intervals between scales are equal, nor do they indicate absolute quantities. They are merely numerical labels (Naom 1998). The normal distribution test was conducted and it has been found that the collected data were normally distributed. The main parametric test, which is the One Sample T Test, has been used.

The population of this study was 72 respondents representing seventy two construction firms. The designation of the respondents was: 52% company director, 18% vice director, 19% project manager, and 11% site engineer. The contract value ranges from 5 million US\$ to 15 million US\$.

## RESULTS AND DISCUSSIONS

### Dispute resolution methods

The respondents were asked regarding their points of view about the usage and the effectiveness of the dispute resolution methods. Table 1 shows the statistical analysis results for the usage and effectiveness of the litigation method and the alternative dispute resolution methods. For the usage degree of litigation method of mean value 1.9697, it can be inferred that the respondents' opinions are negative and are not in agreement with the item content. This means that litigation is not often used in resolving disputes due to its negative impacts on the disputants and project concerning time and money. On the other hand, the respondents' opinions are neutral for the effectiveness of the item content with a mean value of 2.7069. This means that the respondents consider the litigation method has a weak to a moderate effectiveness level in resolving disputes.

For the usage degree of the alternative dispute resolution methods, it can be inferred that the respondents opinions are positive and in agreement with item content for the items ranked 1,2,3,4,5, and 6. The respondents' opinions are negative and are not in agreement with item content for the items ranked 9, 10 and 11. The respondents' opinions are neutral of the item content for the items ranked 7 and 8. On the other hand, for the effectiveness degree of the alternative dispute resolution methods, it can be inferred that the respondents opinions are positive and in agreement with the item content for the items ranked 1,2,3,4,5,6,7 and 8. The respondents' opinions are neutral for the item content for the items rank 9 and 10.

Table 1: Dispute resolution methods

	Type	Group Items	Mean of (5)	Rank	Weight Ratio %	T - value	P-value
Usage	Legal	Litigation method	1.9697	-	39.4	- 10.2	0.000

	Type	Group Items	Mean of (5)	Rank	Weight Ratio %	T - value	P-value
	Alternative dispute resolution methods	Dealing with disputes through informal negotiation (at field level)	3.5362	1	70.7	3.726	0.000
		Dealing with disputes through formal negotiation (at field level)	3.4776	2	69.6	3.674	0.000
		Dealing with disputes through formal negotiation (central office)	3.4638	3	69.3	4.062	0.000
		Dealing with disputes through informal negotiation (central office)	3.4179	4	68.4	3.268	0.002
		Collaborative Problem Solving	3.3134	5	66.3	2.168	0.024
		Mediation	3.2769	6	65.5	2.182	0.033
		Conciliation	3.1719	7	63.4	1.156	0.252
		Arbitration	3.1111	8	62.2	0.926	0.358
		Dealing with disputes through formal negotiation (legal dept.)	2.4627	9	49.3	- 3.88	0.000
		Dealing with disputes through informal negotiation (legal dept.)	2.3529	10	47.1	- 4.56	0.000
		Dispute Adjudication Board DAB	2.0313	11	40.6	- 7.81	0.000
		Average	3.0714		61.4	1.294	0.200
Effectiveness	Legal	Litigation method	2.7069	-	54.1	- 1.38	0.171
	Alternative dispute resolution methods	Arbitration	3.8833	1	77.7	6.775	0.000
		Dealing with disputes through formal negotiation (central office)	3.8769	2	77.5	6.712	0.000
		Dealing with disputes through formal negotiation (at field level)	3.6563	3	73.1	4.482	0.000
		Collaborative Problem Solving	3.6349	4	72.7	4.314	0.000
		Mediation	3.5714	5	71.4	4.168	0.000
		Conciliation	3.5238	6	70.5	3.382	0.008
		Dealing with disputes through informal negotiation (central office)	3.5238	7	70.5	3.762	0.000
		Dealing with disputes through informal negotiation (at field level)	3.4127	8	68.3	2.467	0.016
		Dispute Adjudication Board DAB	2.9	9	58	- 0.60	0.549
		Dealing with disputes through	2.6613	10	53.2	1.85	0.068

	Type	Group Items	Mean of (5)	Rank	Weight Ratio %	T - value	P-value
		formal negotiation (legal dept.)					
		Dealing with disputes through informal negotiation (legal dept.)	2.6032	11	52.1	- 2.33	0.023
		Average	3.444		68.9	5.145	0.000

\* Tabulated T-value equal 1.98 at  $\alpha = 0.05$  and degrees of freedom = 72

### Legal Methods

Table 1 illustrates that the litigation method has a mean value of 1.9697, which is a very low value. This indicates that the litigation method is rarely used in solving disputes. The respondents' opinion is negative towards using it in solving disputes due to the T-value is less than 1.98 and the P-value is less than 0.05. In the same time Table 2 illustrates that 80.3% of the respondents agree that litigation is not used in solving construction disputes. This result can be explained that litigation method depletes more time and money and can cause side conflicts between the owner and contractor. Contractors try to avoid courts in solving disputes. Many employers would blacklist the contractor who has taken them to court, or known to have taken others to court, and label him as claims oriented. This means that the decision to go to court could not only affect the contractor projects in hand but also could jeopardize his future contracts. Employers and Engineers use this stranglehold to manipulate contractors, knowing that they would hesitate to take legal action. Table 2 shows the mean and the percentage of usage in order to clarify the weight of ranking for litigation.

Table 2: Usage of legal methods

	Legal Methods	% Used	% Not used	Mean
1	Litigation	3.1	80.3	1.9697

### Alternative Dispute Resolution Methods

Table 1 illustrates that the alternative resolution methods (ADR) have mean values varies from 3.5362 to 2.0313. In the same time Table 3 shows that, the four types of negotiation method (formal or informal) at the field or office level having the highest weights of usage. This can be explained that contractors wishing to solve work problems by negotiation in order to save time and keep the relation with the owner in a good manner for future interests. On the other hand, formal or informal negotiations at the legal level were ranked at the end of the list due to the sensitivity of owner towards legal actions.

As illustrated in Table 3, the informal negotiation method, was ranked in the first position with a mean value of 3.5362; and 67% of respondents stated that they used it in solving disputes. This method deals with disputes through informal negotiation in the field level as it can solve most of the minor conflicts in the site. In the second position, respondents ranked the formal negotiation in the field level with a mean value of 3.4776 and 58.2% of them used it. These results emphasize that conflicts and disputes should be resolved quickly at their early stages. Contractors support the informal solutions in order to obtain quick field decisions to avoid delay and disruption of formal procedures.

At the center office level, formal negotiation has been ranked in the third position with a mean value of 3.4638 and 47.8% of the respondents stated that they have used it. Informal negotiation has been ranked in the fourth position with a mean value of 3.4179 and 43.3% usage. This means that the dispute becomes complicated and so the need for formal procedures is required to save time. Each party will be responsible for office negotiation outputs and decisions. Collaborative problem solution, mediation, conciliation and arbitration were ranked in the fifth, sixth, seventh and eight positions in a descending order after negotiation with mean values of 3.3134, 3.2769, 3.1719 and 3.1111 respectively. 43.3% of respondents indicated that they have used collaborative problem solution. This result depicts the positive attitude of the contractor towards the owner to exert collaboration efforts to solve problems and disputes together in their early stages.

Ranking Collaborative problem solution before mediation and conciliation means that the disputants themselves try to resolve most of the conflicts and the disputes without a third party instead of transferring disputes to dispute resolution institutions or agencies. It can be deduced that, the number of disputes that are raised to be solved through specialized centers or institutions is less than the number of disputes that are resolved by cooperation between the contractor and owner or resolved by right demission and quitclaim from one party or all parties.

Table 3: Ranking order and usage of alternative dispute resolution methods

Alternative dispute resolution methods	% Used	% Not used	Mean	Rank order
Dealing with disputes through <i>informal negotiation</i> (at field level)	67	20.2	3.5362	1
Dealing with disputes through <i>formal negotiation</i> (at field level)	58.2	17.9	3.4776	2
Dealing with disputes through <i>formal negotiation</i> (central office)	47.8	14.4	3.4638	3
Dealing with disputes through <i>informal negotiation</i> (central office)	43.3	19.4	3.4179	4
Collaborative Problem Solving	43.3	19.4	3.3134	5
Mediation	44.6	19.8	3.2769	6
Conciliation	46.8	29.7	3.1719	7
Arbitration	38.1	23.8	3.1111	8
Dealing with disputes through <i>formal negotiation</i> (legal dept.)	17.9	61.2	2.4627	9
Dealing with disputes through <i>informal negotiation</i> (legal dept.)	17.7	61.8	2.3529	10
Dispute Adjudication Board DAB	6.2	71.9	2.0313	11

Dispute Adjudication Board (DAB) is the least used method. This result can be explained that the DAB is not widely known to the local contractors or consultants. Moreover, it is rarely used in Gaza Strip except some contracts such as World Bank contract, which require DAB in its dispute resolution clauses. DAB is a precautionary system that can protect the contract parties from disputes and claims through reviewing and solving conflicts in its early stages. It is obvious that usage of alternative dispute resolution methods is more frequent than the usage of legal methods. This can be ascribed to the positive characteristics of ADR methods, and the social environment that dominates in the Middle East and the hard procedures of legal methods. In Palestine choosing the court is considered by many to be an aggressive act, unlike western cultures that

consider it a way to resolve disputes. This outlook may have evolved due to the slow legal resolution of disputes in the Palestine.

## CONCLUSION

The aim of this study was to examine the current dispute resolution practices in the construction industry in the Gaza Strip. The results indicated that litigation method is rarely used in resolving disputes. The respondents' contractors stressed that litigation method depletes more time and cost and can cause side conflicts between contractors and owners. In the Palestinian environment, choosing court to resolve disputes is considered by many to be an aggressive act, unlike western culture. Therefore, they tried to avoid courts. Alternative dispute resolution methods are more frequently used than legal methods. Informal negotiation is the most used dispute resolution method. Mediation and conciliation are also widely used methods. Dispute Adjudication Board (DAB) is the least used method, as it is not widely known to the local contractors or owners.

AoE and PCU should exert cooperative efforts in order to qualify specialized arbitrators to help in settling conflicts and litigation disputes. Qualifying new arbitrators can be done through reputation of experts to train and prepare local trainers and arbitrators. Negotiation techniques should be emphasized in the dispute resolution clauses in the contract in order to direct the disputants to use negotiation in solving their conflicts. PCU should conduct continuous training programs in cooperation with AoE to develop the contractors' and owners managerial abilities regarding dispute resolution. These managerial abilities include the ability of contractor to avoid conflicts, deal with conflicts, try to resolve it and participate in the solution.

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